

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Blake B.

Claimant,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2011080233

**DECISION**

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California, on September 26, 2011.

Leigh Ann Pierce, Consumer Services Representative for Inland Regional Center, represented the regional center.

Robin B., claimant's mother, represented the claimant, Blake B.

**ISSUE AND SUMMARY**

Is claimant, as a result of the regional center's reassessment, no longer eligible for Lanterman Act services?

In this decision, it is determined that the regional center's reassessment cannot be upheld because it was not comprehensive and because there was no finding that the original determination that claimant has a developmental disability was clearly erroneous.

## FACTUAL FINDINGS

### *Background*

1. Claimant, Blake B., was born on January 2, 1994. He is 17 years old. He is a regional center consumer.

### *Autism Spectrum Disorders*

2. Whether a diagnosis of autism is warranted depends on whether a subject meets the diagnostic criteria set forth in the Diagnostic and Statistical Manual, Fourth Edition, Text Revised (DSM IV TR). Beginning with section 299.00, at page 69, the DSM IV TR deals with “Pervasive Developmental Disorders,” which include autism.

3. The pervasive developmental disorders are said to be on an autism spectrum. There are five recognized autistic spectrum disorders. When symptoms are severe and exist in a specified number, a diagnosis of autistic disorder is warranted. Autistic disorder is characterized by impairments in social interaction, communication, and imaginative play before an individual is three years of age. It features stereotyped behaviors and restricted interests and activities.

4. There are four less severe autism spectrum disorders. Rett’s disorder is a progressive disorder involving a period of normal development followed by the loss of previously acquired skills, including the loss of purposeful use of the hands. Rett’s disorder usually begins at one to four years of age and is found only in females. Childhood disintegrative disorder is characterized by normal development for at least the first two years followed by a significant loss of previously acquired skills. Asperger’s disorder is characterized by impairments in social interaction and by the presence of restricted interests and activities but with no clinically significant delay in language and with intelligence testing in the average to above average range. Pervasive developmental disorder not otherwise specified (PDD-NOS) is a disorder commonly referred to as atypical autism. A diagnosis of PDD-NOS is made when a child does not meet the criteria for a specific diagnosis but, nevertheless, has severe and pervasive impairments in specified behaviors.

5. Section 299.00 of the DSM IV TR, beginning at page 70, concerns autistic disorder. To diagnose autism, one must find that the subject has qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interest, or activity. One must find a total of at least six of these items. One must find that the impairments in social interaction and communication are marked and sustained. One also must find that there are delays or abnormal functioning, with an onset prior to three years, in social interaction, language as used in social communication, or symbolic or imaginative play.

6. Section 299.00, at page 69, also provides as follows:

Pervasive Developmental Disorders are characterized by *severe and pervasive impairment* in several areas of development . . . . The qualitative impairments that define these conditions are *distinctly deviant* relative to the individual's developmental level or mental age . . . . These disorders are usually evident in the first years of life . . . . (Italics added.)

7. Thus, it is not enough merely to find a qualitative impairment. One must also find that that impairment is severe and pervasive.

8. School districts provide special education services to many children who have conditions that would warrant a diagnosis of one of the four less severe developmental disorders on the autism spectrum – as well as providing special education services to children with autistic disorder. School district documentation concerning special education often uses the terms *autism* and *autistic* to refer to autistic spectrum disorders generally. However, people are eligible for Lanterman Act<sup>1</sup> services under the category of autism only if they have a DSM IV TR diagnosis of autistic disorder. Thus, the fact that a child is referred to in special education documents as autistic or as having autism does not necessarily mean he or she is eligible for regional center services.<sup>2</sup>

#### *Assessments and Documentation Before Regional Center's Reassessment*

9. On October 30, 1995, when claimant was 22 months old, Stephen Ashwal, M.D., Professor of Pediatrics and Neurology at Loma Linda University, examined him. Dr. Ashwal wrote a clinical summary dated October 30, 1995, in which he said “Blake appeared autistic.” Dr. Ashwal also said, “I do believe that Blake has a form of the autistic spectrum disorder.” Dr. Ashwal said that claimant would be evaluated by the regional center and “should qualify for *special education services* with a primary *diagnosis of autism*.” (Italics added.)

10. The regional center emphasizes the fact that Dr. Ashwal said he believed claimant had “a form of the *autistic spectrum* disorder.” (Italics added.) The regional center also emphasizes the fact that Dr. Ashwal said claimant “should qualify for *special education services*” and did not say he should qualify for Lanterman Act services. (Italics added.) Claimant emphasizes the fact that Dr. Ashwal said that claimant “should qualify for special education services with a primary diagnosis of *autism*.” (Italics added.)

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<sup>1</sup> The Lanterman Developmental Disabilities Services Act begins at Welfare and Institutions Code section 4400.

<sup>2</sup> When a school determines that a student is entitled to special services because of an autism disability, the school makes that determination pursuant to California Code of Regulations, title 5. But regional centers are governed by California Code of Regulations, title 17. Title 17 eligibility requirements are more stringent than those in title 5.

11. On January 4, 1996, when claimant was two years old, Vicki McWain, Ph.D., a staff psychologist with the regional center, evaluated him. Dr. McWain wrote a report in which she said she had attempted to administer the Bayley Scales of Infant Development – Second Edition/Mental Scale, but claimant failed to cooperate. Dr. McWain was not able to obtain a score. Dr. McWain’s conclusions were based on her observations and claimant’s parents’ reports. Dr. McWain wrote, “Blake does present with autistic-like traits, although both parents acknowledge more recent progression verses regression in his behaviors.” Dr. McWain said “Overall, Blake appears to have global delays with present impairment in areas of communication, social interaction and range of activities and interests, as well.” Dr. McWain recommended that claimant “be eligible for regional center services under the ‘at-risk’ for a developmental disability/autism category.” Under “diagnostic impressions,” Dr. McWain wrote “global delays with autistic-like traits.”

12. Dr. Ashwal wrote a letter dated April 25, 1996, in which he referred to claimant as a child with delayed language development and autism spectrum disorder.

13. The regional center asked Thomas F. Gross, Ph.D., a psychologist, to evaluate claimant to determine whether he continued to be eligible for regional center services. In April of 1997, claimant was three years and three months old. On April 1, 1997, Dr. Gross, performed a psychological evaluation and wrote a report. Dr. Gross reported that, during his testing, claimant was uncooperative, “attending neither to verbal direction nor motoric demonstration of use of material.” Dr. Gross, based on his observations and on claimant’s mother’s reporting, concluded that claimant qualified for regional center services on the basis of moderate mental retardation. He wrote that, “Based on information provided by [claimant’s mother] Blake does not fit the profile of a child with autism. Many of the repetitive and stereotypical behaviors seen in children with autism have dropped from his repertoire as of about 6 or 7 months [ago].<sup>3</sup> He is also reported to have become increasingly social.” Dr. Gross’s report is the only one that suggests that claimant has mental retardation.

14. Claimant’s mother continued to believe that claimant exhibited many autistic behaviors. She asked the regional center to fund services by the Center for Autism and Related Disorders (CARD). On August 26, 1997, when claimant was three years and seven months old, Dr. McWain performed a psychological assessment to determine whether claimant was autistic. She concluded he was. Dr. McWain wrote a report in which she said she had observed claimant in his home, in his day care, and in her office. When Dr. McWain attempted to do a formal assessment, claimant did not seem to understand the material. Thus, Dr. McWain’s diagnosis and recommendations were based on her observations and

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<sup>3</sup> The report says, “Many of the repetitive and stereotypical behaviors seen in children with autism have dropped from his repertoire as of about 6 or 7 months *age*.” (Italics added.) There is no preposition in front of the word “age.” Also, earlier in the report, Dr. Gross said claimant’s mother reported that she had seen much progress with respect to the elimination of repetitive behaviors over the past six months. It appears that “age” was a typographical error.

claimant's mother's reporting. Dr. McWain wrote, "Blake does present with severity of impairment across the social triad of communication, social interaction, and restricted range of interests and activities to warrant a diagnosis of Autistic Disorder. However, his score on the CARS, Childhood Autism Rating Scale, is 29.5, just at the cutoff, suggesting the presence of a very mild syndrome. [¶] . . . [¶] He continues to engage in self-stimulatory behaviors of auditory verbalization of "eee," use of his peripheral vision, and hand flapping." Dr. McWain diagnosed autistic disorder and recommended continued eligibility for regional center services.

15. After Dr. McWain diagnosed autistic disorder and recommended continued eligibility for regional center services, the regional center did continue to provide services. A diagnosis of autism does not entitle one to services unless a regional center determines that the condition constitutes a substantial disability for the individual. (Welf. & Inst. Code § 4512, subd. (a)) Thus, from the combination of Dr. McWain's diagnosis and the fact that the regional center continued to provide services, one must infer that the regional center determined that respondent's autism caused the existence of significant functional limitations in three or more of the areas of major life activity listed in Welfare and Institutions Code section 4512, subdivision (1) – which are self care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency.

16. In August of 1998, claimant was four years old and was attending a regular kindergarten program in the mornings. He received discrete trials training in the afternoons from a school employee. The regional center funded 10 hours a week of shadow time to facilitate claimant's integration, to provide prompts to stay on task, and to provide structure as necessary. On August 14, 1998, Bob Chang, Ph.D., a staff psychologist with the regional center observed claimant in his kindergarten and wrote a report. In his report, Dr. Chang noted that claimant had a diagnosis of autism. Based on claimant's parents' completion of child development inventories and on the reports of school staff and CARD reports, Dr. Chang concluded that claimant had made dramatic progress during the past year. Dr. Chang reported that the school staff now feel that claimant has close to normal intelligence. Dr. Chang concluded that, "In terms of Regional Center services, he continues to need social skills training, safety training, functional/adaptive skills training, along with continued efforts to facilitate community integration."

17. In September of 2002, claimant was eight years old and in the third grade. A special education services individualized educational plan (IEP) of September 9, 2002, reflects a primary disability of autism. According to the IEP, claimant was in a regular third grade class but was pulled out for CARD and speech. The IEP said, "Blake is able to function near normally in a third grade classroom, but the occasional outburst (reportedly about once every three days) makes some intervention and support still necessary." As noted above, the term "autism" often is used in special education documents in spite of the fact that a student would not qualify for a diagnosis of autistic disorder.

18. A special education services IEP of February 20, 2003, continues to reflect a primary disability of autism.

19. In August of 2003, claimant was nine years old. David Satre, Psych.D., a school psychologist, did a psychoeducational assessment. Claimant's mother completed an adaptive behavior assessment concerning claimant's level of abilities. Dr. Satre did not do formal testing. Based on the mother's reporting, Dr. Satre wrote, "Blake's adaptive behavior scores (NABC-R) indicate that, in spite of being an autistic child, he has made significant gains academically and socially. All of his scores on this scale indicate average functioning. Two areas were low average, that of Home Living and Independent Living, both of which continue to need to be worked with. He is functioning a year and three months below his age level . . . ."

20. In September of 2009, claimant was 15 years old. A special education services triennial assessment worksheet dated September 22, 2009, says that claimant's IEP team members agree that claimant's disability of autism "continues to be present."

#### *Reassessment Purportedly Concerned Mental Retardation*

21. The regional center insists that it reassessed claimant to determine whether he continued to be eligible for services under a diagnosis of mental retardation. Ms. Pierce said the regional center has never carried claimant as a consumer under the eligibility category of autism. That places form over function. For many years, everyone has understood that claimant is not mentally retarded. On August 26, 1997, when claimant was three years and seven months old, Dr. McWain diagnosed autistic disorder and recommended continued eligibility for regional center services. On August 14, 1998, Dr. Chang, observed claimant in his kindergarten class and wrote a report in which he noted that claimant had a diagnosis of autism. Dr. Chang reported that the school staff felt that claimant has close to normal intelligence. Dr. Chang concluded that claimant continued to need certain regional center services, and the services he listed were ones that are appropriate for treating autism.

22. While the regional center contends the reassessment concerned mental retardation, it actually focused on autism.

#### *Regional Center's Reassessment*

23. On January 13, 2011, Sandra Brooks, Ph.D., a staff psychologist with the regional center, performed a reassessment to determine whether claimant continued to be eligible for regional center services. Claimant had just turned 17 years old.

24. Dr. Brooks administered the following assessment procedures: Autism Diagnostic Observation Schedule – Module #3 (ADOS). Vineland Adaptive Behavior Scales – Second Edition (Vineland). Street Survival Skills Questionnaire (SSSQ).

25. Dr. Brooks also observed claimant and reviewed his file.

26. In Dr. Brooks's report, she wrote that she conducted a parent interview. There is no evidence that she met with claimant's father, and the only interview she had with claimant's mother was during the testing – when claimant was present.

27. Claimant's mother completed the Vineland. When she and claimant arrived at the regional center for the reassessment, Dr. Brooks had someone give claimant's mother the Vineland form and ask her to complete it. Claimant's mother was sitting in the regional center waiting area, and claimant was with her. She testified that she felt constrained in completing the Vineland because claimant was looking over her shoulder and began questioning her about her responses. He asked questions such as, "Why did you say that?" Claimant's mother testified that she tries to stress claimant's accomplishments in order to encourage him. She said she avoids saying things claimant may interpret as criticisms or condemnations. She said that, for these reasons, she felt constrained in completing the Vineland with claimant looking over her shoulder.

28. After claimant's mother completed the Vineland, Dr. Brooks met with claimant and his mother, administered the ADOS and the SSSQ, and observed claimant.

29. After Dr. Brooks completed her testing, claimant's mother said she would like to have an opportunity to talk with Dr. Brooks privately. At 11:38 a.m., which was shortly after Dr. Brooks completed her testing, she sent claimant's mother an email in which she said:

I just wanted to provide you an opportunity to share any concerns you may have about Blake, especially those you might not be comfortable sharing in his presence. In particular, what symptoms/behaviors does he exhibit that are suggestive of Autistic Disorder, and what concerns do you have about his ability to live independently? You may also call me at my direct extension, which is listed below.

30. On the following day, January 14, 2011, claimant's mother sent Dr. Brooks a rambling email in which she addressed a few behavioral issues. It is clear from Dr. Brooks's report that she considered all of the behavioral items claimant's mother mentioned in her email.

31. Dr. Brooks scored the Vineland, the ADOS, and the SSSQ and wrote a report. She diagnosed claimant as having PDD-NOS, which as noted above, is an autism spectrum disorder. One cannot have more than one diagnosis on the autism spectrum. A diagnosis of PDD-NOS rules out a diagnosis of autistic disorder. Dr. Brooks recommended that claimant be found not eligible for regional center services.

32. Claimant's mother testified that a number of things Dr. Brooks reported and relied on were not accurate. Claimant's mother acknowledged that claimant told Dr. Brooks those things. Claimant's mother testified that she did not contradict claimant because she

does not undercut him in the presence of others. Thus, Dr. Brooks may have inferred that claimant's mother endorsed things claimant said when, in fact, the mother disagreed. And Dr. Brooks acknowledged the possibility that she relied on things claimant told her about himself that, in fact, were not true.

33. Claimant's mother testified that, as a result of years of specific training, claimant has learned to say things that tend to mask his shortcomings. He has memorized what he is supposed to say. It is possible that, if Dr. Brooks had observed claimant at school and met privately with his teachers, aide, and parents she would have come away with a very different impression of claimant. Claimant's mother testified as to a number of things in Dr. Brooks's report that are not correct and that a more complete assessment would have shown to be incorrect. For example, in Dr. Brooks's report, she says, "According to his mother, Blake has always done very well academically; he has been a straight A student." Claimant's mother testified that that suggests a level of accomplishment that is not accurate. Blake is in a special education program. He attends some regular classes with accommodation and is graded according to a differential standard based on his ability. Another example is Dr. Brooks's report that "Blake currently works at two ski shops, one of which is owned by his family. [¶] . . . [¶] The other store is owned by a friend of Blake's mother." Claimant's mother testified that that, also, suggests a level of accomplishment that is not accurate. Claimant's parents have him work in their shop in spite of his lack of ability. And claimant's mother's friend *employs* claimant as a favor to claimant's mother, who reimburses the friend for claimant's *salary*.

34. Dr. Brooks scored the Vineland, with claimant's mother reporting, as follows: Claimant's adaptive level for communication is "moderately low," and his adaptive levels for daily living skills and socialization are "low." Those produced a composite adaptive level of "low."

35. Claimant obtained a score of seven on the ADOS, which is the cutoff for a diagnosis on the autism spectrum. In order to support a diagnosis of autistic disorder, however, the score must be 10. But Dr. Brooks testified that one does not base a diagnosis on the results of a single instrument.

*Mr. Timmons's Quarterly Report of February 16, 2011*

36. Claimant's regional center services coordinator, Daniel Timmons, wrote a quarterly report dated February 16, 2011. Claimant was 17 years old. Mr. Timmons wrote that claimant qualified for regional center services with a diagnosis of moderate mental retardation but that, "Blake's diagnosis is subject to some debate . . . ." Mr. Timmons wrote:

[Claimant] is enrolled into typical education classes . . . and has a 1:1 aide. [¶] . . . [¶] Blake continues to work on improving his social skills and is involved in Drama Club.

[¶] . . . [¶]



Blake is efficient with all personal care and self help skills. He is able to get himself ready in the morning for school with no assistance. Blake is able to take medication independently without assistance. He has no deficits in regards to eating, dressing, and toileting. Blake is reported to require that an adult be nearby in all settings to assure his safety. Parent reported that Blake is cognitively aware of rules but can be impulsive and will not follow the rules.

[§] . . . [§]

Blake attends all general education classes at . . . High School . . . He does have the assistance of an instructional aide, Kathy Nielson, to assure his safety and to provide social guidance when needed. Academically, he has not required any work to be modified. His last IEP was in May, 2010. Blake is active with extra curriculum school activities. This year, he is participating in Drama and the Interact Club.

[§] . . . [§]

Blake is a socially active young man who likes to be involved in social activities. He participates in the Drama and Interact clubs at school. He continues to have difficulty in making new friends and understanding social cues.

Blake's diagnosis is subject to some debate.

37. Mr. Timmons testified that he has been claimant's service coordinator for four years. He, however, has spent very little time with claimant – approximately five minutes once every three months. Mr. Timmons has spent a little more time than that talking with claimant's mother and with Ms. Nielson, claimant's one on one aide.

#### *Notice of Proposed Action and Appeal*

38. By a notice of proposed action dated August 2, 2011, the regional center advised claimant's mother that, based on Dr. Brooks's reassessment, the regional center had concluded that claimant was not eligible for regional center services. Claimant appealed.

#### *Letter form Claimant's Aide*

39. Kathryn Nielson has been claimant's one on one aide since he entered the eighth grade. Ms. Nielson wrote a letter dated August 30, 2011, in which she outlined many of claimant's behaviors that she characterizes as autistic. Dr. Blake did not speak with Ms. Nielsen.

### *CARD Evaluation of September 13, 2011*

40. On September 13, 2011, Alan Golian, B.A., a psychology intern with CARD, did a psychological evaluation and wrote a draft of a report. The draft shows that Evelin Garcia, Psy.D., a licensed psychologist and Director of Assessments for CARD, served as Mr. Golian's supervisor. Neither Mr. Golian nor Dr. Garcia testified. Neither of them signed the draft. The report is printed on paper that is preprinted with the word *draft* on each page in two inch letters. There was no evidence as to whether Mr. Golian considered this to be a final version of his report. There was no evidence as to what Dr. Garcia did by way of supervision and no evidence as to whether she has even seen the draft. Welfare and Institutions Code section 4712, subdivision (i), provides that fair hearings need not be conducted according to technical rules of evidence. Parties, generally, are not required to formally authenticate documents. And the regional center did not object to Mr. Golian's draft being received in evidence. But a document should not be used unless it has some indicia of authenticity and reliability. It is found that Mr. Golian's draft cannot be used as evidence of anything other than to supplement claimant's mother's testimony that Mr. Golian did an evaluation.

### *Finding that the Reassessment was not Comprehensive*

41. The Lanterman Act requires that any reassessment of eligibility be "comprehensive." The Act does not provide a definition of comprehensive, but it must be assumed that the Legislature intended the word be given some significance. In order to be comprehensive, an assessment must cover a matter completely. In order to completely cover a reassessment of claimant's eligibility, one would have to interview one or both of his parents privately. One would have to provide an appropriate, private setting for the person completing the Vineland. One would have to observe claimant in his school setting with his peers, and one would have to interview his teachers and aide. And one would have to administer appropriate instruments. All of those are things one might like to do in making an original assessment, but when the Legislature mandates that a reassessment be comprehensive, all of those things – or enough of them to cover the matter completely – must be done. It is found that the regional center's reassessment was not comprehensive.

42. One might suggest that claimant's parents should have been more aggressive in insisting on a more comprehensive assessment. Claimant's mother, for example, might have insisted on a private interview with Dr. Brooks. But even if one could identify ways in which the parents could have been more aggressive, that would miss the point. The regional center's statutory duty to make its reassessment comprehensive is not owed to claimant's parents. That duty is owed to claimant. The Lanterman Act makes the regional center responsible for making sure any reassessment is comprehensive.

### *Failure to Find that the Original Determination was Clearly Erroneous*

43. There was no evidence that Dr. Brooks or anyone else concluded that the original determination that claimant has a developmental disability was clearly erroneous.

## LEGAL CONCLUSIONS

1. The Lanterman Act provides special protection for a consumer's determination of eligibility. Once a person has been determined to be eligible for Lanterman Act services, the Act requires that any reassessment of eligibility be comprehensive. Also, one's eligibility cannot be revoked unless the "comprehensive reassessment" causes a regional center to conclude that the original determination was "clearly erroneous." (Welf. & Inst. Code § 4643.5, subd. (b)).

2. There are two ways in which an original determination might have been erroneous. It might have been erroneous because the person does not have any of the qualifying conditions listed in Welfare and Institutions Code section 4512, subdivision (a), i.e., because the person does not have mental retardation, cerebral palsy, epilepsy, autism, or a fifth category condition. The second way in which an original determination might have been erroneous is that, while the individual had one of those conditions, the condition did not constitute a substantial disability for the individual. If a reassessment concerns that second matter, the reassessment must "utilize the same criteria under which the individual was originally made eligible." (Welf. & Inst. Code § 4512, subd. (l)).

3. In the present case, the subdivision (l) "same criteria" requirement does not come into play because the regional center did not base its reassessment on a determination that claimant's disability does not constitute a substantial disability for him. Rather, the regional center based its reassessment on a conclusion that claimant does not have any of the qualifying conditions listed in Welfare and Institutions Code section 4512, subdivision (a).

4. The regional center's conclusion, however, cannot be upheld because of a failure to satisfy the two requirements of Welfare and Institutions Code section 4643.5, subdivision (b). By reason of the matters set forth in Findings 23 through 35 and 41, it is determined that the reassessment was not comprehensive, and by reason of the matters set forth in Finding 43, it is determined that the regional center failed to conclude that the original determination was "clearly erroneous."

## ORDER

Claimant's appeal from the regional center's reassessment of his eligibility is granted; claimant continues to be eligible for Lanterman Act services.

DATED: September 29, 2011

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ROBERT WALKER  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

Notice: This is the final administrative decision in this matter. Each party is bound by this decision. If a party chooses to appeal, an appeal from this decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf.& Inst. Code, § 4712.5, subd. (a).)